

A **RANJAN PARAMALINGAM & ANOR v. BANGSAR PARK
RESIDENTS ASSOCIATION**

HIGH COURT MALAYA, KUALA LUMPUR

ALIZA SULAIMAN JC

[CIVIL SUIT NO: WA-22NCVC-152-03-2017]

B 23 MAY 2019

C **CIVIL PROCEDURE:** *Action – Cause of action – Whether there was public law element in dispute or a mixture of public and private law – Whether court to ascertain which element was predominant – Plaintiff's cause of action had substantial private law element – Whether plaintiff entitled to frame cause of action*

D **CIVIL PROCEDURE:** *Disposal of case on point of law – Determination of question of law – Whether there were material facts in dispute – Whether straightforward case – Whether one that could appropriately be dealt with under O. 14A and/or O. 33 r. 2 of Rules of Court 2012 – Whether had to go for full trial*

E The first plaintiff was the registered proprietor of a house located in Bangsar Park ('the property'), and the second plaintiff was the tenant even before the first plaintiff became the registered proprietor. The defendant was a society registered under the Societies Act 1966. The essence of the dispute between the parties was over the establishment of a gated and guarded scheme ('GGS') in an area within a part of Bangsar Park. The plaintiffs pleaded that the defendant had set up permanent locked and unmanned barriers on various public streets within a part of Bangsar Park so as to form an illegal GGS and had allegedly excluded various forms of vehicular traffic, pedestrians and even animals from having the right to access, and of passage, on public roads in Bangsar Park. The plaintiffs were also displeased with the 'interrogation' carried out by the security guards engaged by the defendant on persons entering the area concerned and the surveillance through the cameras installed at the guard post. The acts by the security guards in inspecting and making copies of identity cards and other identification documents of the people they interrogate, by which personal details were revealed, was said to be a breach of the Personal Data Protection Act 2010. The monthly fees collected for the purposes of maintaining the security posts and personnel under the GGS were regarded by the plaintiffs as a 'crime of extortion' and an attempt to impose 'unlawful toll charges'. The plaintiff claimed that the acts/conduct of the defendant were in direct contravention of various statutory provisions and therefore, instituted a civil suit against the defendant. The defendant counter claimed against the plaintiffs for a mandatory injunction restraining the plaintiffs, whether acting on their own, through their servants, and/or agents or any of them, or otherwise in any way to interfere with or harass the defendant, its committee members and the security guards in the discharge of their duties and functions. The defendant

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had also filed an application to strike out the plaintiffs' writ of summons and amended statement of claim pursuant to O. 18 r. 19(1)(a), (b) or (d) and/or O. 92 r. 4 of the Rules of Court 2012 ('ROC') ('encl. 9'). The High Court allowed the defendant's application. However, the plaintiffs' appeal against the decision was allowed by the Court of Appeal. By the notice of application herein pursuant to O. 14A and O. 33 r. 2 of the ROC ('encl. 74'), the defendant moved the court to determine the following issues: (i) whether the plaintiffs' claim against the defendant was based solely on substantive principles of public law or had a predominant and substantial public law element; and (ii) whether the plaintiffs should have commenced an action by way of judicial review against the Kuala Lumpur City Council ('DBKL') about its complaint instead of filing an action against the defendant. The issues for the court's determination were: (i) was there delay in the filing of encl. 74; (ii) was the plaintiffs' claim against the defendant based solely on substantive principles of public law or had a predominant and substantial public law element; and (iii) whether this matter was one that could appropriately be dealt with under O. 14A and/or O. 33 r. 2 of the ROC.

Held (dismissing defendant's application with costs):

- (1) The defendant's assertion that the plaintiffs had chosen the wrong mode of commencement of proceedings, if truly genuine and meritorious, should have occurred to the defendant from the very outset. In failing to raise this point of argument for purposes of the hearing of encl. 9 and seeking to do so in encl. 71, the defendant was clearly arguing its case in instalments and thereby causing prejudice to the plaintiffs as the progression of the matter for trial had been very much delayed. For the defendant to claim an abuse of process of the court, this time with the defendant's stated intention to seek a determination of the issue pursuant to O. 14A and/or O. 33 r. 2 of the ROC, was tantamount to an abuse of the court's process. Enclosure 74 was a disguised second application for striking out. Hence, there was merit in the plaintiff's contention that there was delay on the part of the defendant in making the application in encl. 74. (paras 39-41)
- (2) Whether an action was to be commenced by way of filing a writ and statement of claim or under O. 53 of the ROC was dependent on the facts of each case. In deciding the defendant's application, the court had to ascertain whether there was a public law element in the dispute, and if there was a mixture of public and private law, which of the two elements were more predominant. The plaintiffs were relying on the whole gamut of constitutional and statutory provisions relating to, *inter alia*, the setting up and manning of road blocks; illegality of obstructions on public roads; law enforcement powers of the police and other agencies and their non-delegable features; and personal data protection in mounting this legal challenge against the defendant. (paras 45 & 56)

- A (3) The amended statement of claim, when taken with the overall affidavit evidence related to encl. 74, lent support for the finding that the plaintiff's cause of action had a substantial private law element. Whilst the factual matrix of the case was such that there were features of both public nuisance and private nuisance, the plaintiffs had chosen to frame its cause of action as one that was primarily founded on the private tort of nuisance, which the plaintiffs were well entitled to do. Even applying the 'pith and substance' test, the court could not conclude differently. (para 57)
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- C (4) There were material facts in dispute and the plaintiffs used all possible angles of their arsenal of legal arguments to challenge the implementation of the GGS. The case was not a straightforward case which could suitably be determined under the procedure as provided by O. 14A and/or O. 33 r. 3 of the ROC. The matter had to go for full trial and the questions of law were directed to be drafted as the 'issues to be tried'. In the circumstances, the two questions of law were answered in the negative. (paras 58 & 59)
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Case(s) referred to:

- Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805 CA (*refd*)
- E *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Keseniaan Johor & Ors* [2010] 5 CLJ 865 FC (*refd*)
- Attorney-General (on the relation of Glamorgan County Council and Pontardawe Rural District Council) v. PYA Quarries Ltd* [1957] 1 All ER 894 (*refd*)
- Au Kean Hoe v. Persatuan Penduduk D'Villa Equestrian* [2015] 3 CLJ 277 FC (*refd*)
- Chan Kum Loong v. Hii Sui Eng* [1979] 1 LNS 10 FC (*refd*)
- F *Dato' Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur* [2019] 1 CLJ 247 HC (*refd*)
- Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248 CA (*refd*)
- Kerajaan Negeri Kelantan v. Petroliaam Nasional Bhd & Other Appeals* [2014] 7 CLJ 597 FC (*refd*)
- G *Majlis Perbandaran Pulau Pinang v. Boey Siew Than & Ors* [1977] 1 LNS 68 HC (*refd*)
- Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337 CA (*refd*)
- Sin-Kung Logistics (KL) Sdn Bhd v. Projek Lebuhraya Usahasama Bhd* [2015] 5 CLJ 457 CA (*refd*)
- H *Tenaga Nasional Bhd v. JCY HDD Technology Sdn Bhd* [2013] 7 CLJ 799 HC (*refd*)
- Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49 FC (*refd*)
- YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210 HC (*refd*)

Legislation referred to:

- I Federal Constitution, art. 9
- Rules of Court 2012, O. 14A, O. 18 r. 19(1)(a), (b), (d), O. 33 r. 2, O. 53, O. 92 r. 4
- Rules of the High Court 1980, O. 53
- Specific Relief Act 1950, s. 44(1)(d)

Other source(s) referred to:

Bullen & Leake & Jacob's Precedents of Pleadings, 13th edn, p 702

For the plaintiffs - Bastian Pius Vendargon & Anne Vendargon; M/s Bastian Vendargon

For the defendant - Fahri Azzat & Ameerul Aizat; M/s Fahri & Co

Reported by S Barathi

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JUDGMENT**Aliza Sulaiman JC:****Introduction**

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[1] The first plaintiff is an advocate and solicitor who is currently a partner of Messrs P S Ranjan & Co. On 13 March 2015, the first plaintiff became the registered proprietor of the house at No. 79, Jalan Limau Manis, Bangsar Park, 59000 Kuala Lumpur ('said property'). The second plaintiff has been a tenant of the said property even before the first plaintiff became the registered proprietor of the same.

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[2] The defendant is a society registered under the Societies Act 1966 (Act 335) where some residents of Bangsar Park are its members.

[3] The essence of the dispute between the parties is over the establishment of a gated and guarded scheme ('GGS') in an area within a part of Bangsar Park which the plaintiffs claim is in breach of the law.

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[4] By a notice of application ('NOA') pursuant to O. 14A and O. 33 r. 2 of the Rules of Court 2012 ('ROC 2012') filed on 27 September 2018 (encl. 74), the defendant moves this court to determine the following issues of law before the trial:

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(i) Whether the plaintiffs' claim against the defendant is based solely on substantive principles of public law or has a predominant and substantial public law element?

(ii) Whether the plaintiffs should have commenced an action by way of judicial review against the Kuala Lumpur City Council ('DBKL') about its complaint instead of filing an action against the defendant?

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If both the above questions are answered in the affirmative, the defendant seeks an order that the plaintiffs' claim be struck out with costs for being an abuse of court process.

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[5] The grounds for the application as stated in the NOA are that:

(i) the questions of law raised deal with threshold issues regarding the plaintiffs' claim that ought to be decided before preparations are made for the full trial of claim so that time, costs and effort is saved if the threshold issues do not favour the plaintiffs;

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- A (ii) the facts upon which the questions of law are based are substantially agreed upon;
- (iii) the question in sub-para. 4(i) above will clarify the nature of the plaintiffs' claim against the defendant and enable this court to determine whether the plaintiffs have used the appropriate originating process based on the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Keseniaan Johor & Ors* [2010] 5 CLJ 865;
- B (iv) the question in sub-para. 4(ii) above intends to determine whether the plaintiffs have used the correct procedure in making their claim; and
- C (v) if these preliminary issues are decided in favour of the defendant, it would conclude the entire proceedings and it would be unnecessary to try other issues.

[6] Having considered oral submissions by learned counsel representing the parties, the NOA, affidavits, written submissions and four letters submitted after the hearing date (ie, three letters dated 9 January 2019, 10 January 2019 and 11 January 2019 from the plaintiffs' counsel and one letter dated 11 January 2019 from the defendant's counsel regarding the additional document titled "Timeline Proving That There Was No Approval From DBKL For A Period Of 12 Months"), I dismissed the defendant's application with costs of RM5,000 to the plaintiffs subject to allocatur.

[7] Being dissatisfied, the defendant has appealed against my entire decision. These are my full grounds in arriving at the conclusion as I did.

The Cause Papers

- F [8] The following are the relevant cause papers for purposes of encl. 74:
- (i) the plaintiffs' amended statement of claim ('SOC') dated 10 April 2017 (encl. 4);
- (ii) the defendant's amended defence and counterclaim dated 7 August 2018 pursuant to the order of the court on 31 July 2018 (encl. 65);
- G (iii) the plaintiffs' amended reply and defence to amended counterclaim dated 12 September 2018 pursuant to the same order of the court on 31 July 2018 (encl. 66);
- H (iv) the defendant's affidavit in support ('AIS') of the NOA affirmed on 27 September 2018 (encls. 68 - 73);
- (v) the plaintiffs' affidavit in reply (1) ('AIR') affirmed on 22 October 2018 (encl. 75);
- (vi) the defendant's AIR affirmed on 9 November 2018 (encl. 77);
- I (vii) the plaintiffs' AIR (2) affirmed on 26 November 2018 (encl. 78); and
- (viii) the defendant's AIR (2) affirmed on 10 December 2018 (encl. 86).

Salient Background Facts

[9] The plaintiffs pleaded that on or about 2 January 2017, the defendant set up permanent locked and unmanned barriers on various public streets within a part of Bangsar Park so as to form an illegal GGS. These barriers have allegedly excluded various forms of vehicular traffic, pedestrians and even animals from having the right to access, and of passage, on public roads in Bangsar Park.

[10] In addition, these barriers are said to pose a danger to the public, particularly in conditions of bad weather, heavy traffic, illegal parking and at night when the barriers are not lighted or not sufficiently lighted, and in the absence of, or insufficient, warning signs.

[11] Apart from the grievances regarding the barriers, another source of complaint of the plaintiffs relate to the security checkpoint. The plaintiffs are displeased with the “interrogation” carried out by the security guards engaged by the defendant on persons entering the area concerned and the surveillance through the cameras installed at the guard post. The acts by the security guards in inspecting and making copies of identity cards and other identification documents of the people they interrogate, by which personal details are revealed, is said to be a breach of the Personal Data Protection Act 2010 [Act 709].

[12] It is the norm for monthly fees to be collected from the residents for purposes of maintaining the security posts and personnel under such GGS. It is no different in this particular instance but the plaintiffs regard the collection of these fees as a “crime of extortion” and an attempt to impose “unlawful toll charges”.

[13] Among the plaintiffs’ other contentions is that the defendant, while purporting to undertake law enforcement, and traffic and vehicle parking control duties, has not given any or sufficient assurance that it will assume legal liability, in both civil and criminal law, for any breach of such duties. Furthermore, the alleged illegal and unreasonable acts by the defendant have been perpetrated in other areas by their respective residents’ associations, without paying heed to the objections by certain sections of the affected communities.

[14] The plaintiffs claim that the acts/conduct of the defendant are in direct contravention of statutory provisions such as art. 9 of the Federal Constitution; and in the Private Agencies Act 1971 [Act 27]; Street, Drainage and Building Act 1974 [Act 133]; Immigration Act 1959/63 [Act 155]; Highway Authority Malaysia (Incorporation) Act 1980 [Act 231]; Customs Act 1967 [Act 235]; Road Transport Act 1987 [Act 333]; Minor Offences Act 1955 [Act 336]; Police Act 1967 [Act 344]; Penal Code [Act 574]; and National Registration Regulations 1990.

- A [15] According to the plaintiffs, they had made attempts to meet the defendant's President, Mr Nitesh Malani with a view of achieving an amicable settlement to the dispute. However, all efforts came to naught.
- [16] Therefore, this civil suit was instituted by which the plaintiffs pray for the following reliefs:
- B (i) a declaration that the defendant had operated an illegal security business within the illegal security area;
- (ii) a declaration that the plaintiffs are entitled to travel on any public street in or within any public part of Bangsar Park without obstruction on the part of the defendant;
- C (iii) a perpetual injunction restraining the defendant and its officials, servants and agents from operating the illegal security business and, in regard to the illegal security area, from permanently or temporarily obstructing public streets or roads, from operating roadblocks or security checkpoints on public streets or roads, from undertaking interrogation of and body searches of people who enter or leave the illegal security area, from inspecting and making copies of identification documents of such people, from conducting surveillance of such people whether by camera or otherwise, from making photographs or making video images of such people and the vehicles on or in which they travel or the animals that they travel on or with, from inspecting and searching motor vehicles, and luggage carried in them, and from inspecting letters, documents and articles carried by any person;
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- F (iv) a perpetual injunction restraining the defendant and its servants and agents from harassing the plaintiffs when they approach, enter or remain within the illegal security area, and from harassing the invitees, licensees and other lawful visitors who intend to enter upon the said property;
- G (v) an order that the defendant do abate the nuisance within such time as is allowed by the court;
- (vi) an order for an inquiry by a proper officer of the court as regards the personal data relating to the plaintiffs that has been acquired by the defendant, for an account by the defendant to the plaintiffs as regards such data, and for such consequential relief as the court may deem fit;
- H (vii) damages, including aggravated damages; and
- (viii) interest on the damages, costs and such further or other relief as the court deems fit.
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[17] In its defence, the defendant contends that the plaintiffs have no *locus standi* and/or cause of action against the defendant because the said property is located at a road which is situated outside the GGS implemented by the defendant with DBKL's approval. Furthermore, the construction of the guardhouse, automated gates and manual barriers are not illegal since DBKL, which has the power to provide authority and/or administrative direction to allow private persons or organisations to operate a security and traffic dispersal area and exclusion scheme, has approved the same.

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[18] The defendant takes the position that the GGS was implemented so as to improve public safety and security within the defined areas of Bangsar Park. DBKL's guidelines on guarded communities addresses the rights of residents who opt not to participate in the security scheme. Hence, the plaintiffs' complaints, which are essentially of inconvenience rather than of obstruction, should be channeled to DBKL instead of filing this civil suit.

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[19] The defendant has counterclaimed against the plaintiffs for a mandatory injunction restraining the plaintiffs whether acting on their own, through their servants, and/or agents or any of them, or otherwise in any way to interfere with or harass the defendant, its committee members and the security guards in the discharge of their duties and functions.

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[20] At this juncture, it should be mentioned that the defendant had filed an application to strike out the plaintiffs' writ of summons and amended SOC pursuant to O. 18 r. 19(1)(a), (b) or (d) and/or O. 92 r. 4 of the ROC 2012 on 6 June 2017 (encl. 9) on the grounds that:

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(i) the plaintiffs do not have *locus standi*;

(ii) the administrative approval of the GGS has been obtained from DBKL *vide* letter dated 24 October 2016 for a trial period of three months subject to the guidelines set by the Ministry of Housing and Local Government and such approval was extended further until 7 June 2017 *vide* DBKL's letter dated 8 March 2017; and

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(iii) with reference to the judgment of the Federal Court in *Au Kean Hoe v. Persatuan Penduduk D'Villa Equestrian* [2015] 3 CLJ 277, the construction of the guardhouse, automated gate and manual barriers were included in the layout plan submitted to DBKL, and were subsequently approved. The plaintiffs' objections against the GGS should thus be brought to DBKL as the proper forum.

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[21] The High Court allowed the defendant's application on 25 August 2017. However, the plaintiffs' appeal against the decision of the High Court was allowed by the Court of Appeal on 23 March 2018.

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A The Defendant's Submissions

[22] The defendant submitted that this is an appropriate case to be disposed of by way of O. 14A and/or O. 33 r. 2 of the ROC 2012 because there is a threshold legal issue that needs to be considered in light of the plaintiffs' claim and the reliefs sought. It is the defendant's stance that the facts relating to the legal issue are not in dispute.

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[23] The threshold legal issue pertains to an additional ground of defence which the current solicitors acting for the defendant had successfully applied to be included in the defence and counterclaim by way of an order of the court on 31 July 2018. The said defence is that the pith and substance of the plaintiffs' claim as pleaded in their amended SOC has predominantly public law elements because it seeks to enforce public rights. The plaintiffs' contention that their claim is for private nuisance is baseless and even contradicts their pleaded case and the reliefs prayed for. At best, the purported private nuisance claim is a minor or secondary claim to the actual claim. For this reason, the defendant argued that the plaintiffs should initiate judicial review proceedings against DBKL in respect of its complaints against the GGS. If necessary, the defendant can be joined as a respondent in those proceedings.

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[24] The defendant relied on the Federal Court decision of *Ahmad Jefri Mohd Jahri (supra)* to support its argument that where a claim is wholly or contains predominantly public law elements or deal with public law rights, then the appropriate mode of proceeding is judicial review and not a writ action. Thus, the plaintiffs' claim by way of a writ action is an abuse of court process.

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[25] The plaintiffs' pleaded case, it is said, relates to the usage and enjoyment outside of their land ie, right of public access to the street, freedom of movement, traffic issues and the like which are principally public elements and do not concern any unlawful interference against the usage and enjoyment of the plaintiffs' land.

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[26] Another ground for the defendant to say that the plaintiffs' claim has a public law element is due to the references to statutes which have their respective enforcement agencies, for example, the Street, Drainage and Building Act 1974 [Act 133] is, in this case, under the purview of DBKL; the Penal Code [Act 574], Police Act 1976 [Act 344] and Minor Offences Act 1955 [Act 336] are under the purview of the Royal Malaysia Police ('PDRM'); and the Road Transport Act 1987 [Act 333] is under the purview of the Ministry of Transport and its departments. Hence, the plaintiffs' recourse for any breach of those statutory provisions is by lodging complaints to the relevant authorities.

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[27] The cases referred to by learned counsel in the course of his submissions are *Majlis Perbandaran Pulau Pinang v. Boey Siew Than & Ors* [1977] 1 LNS 68; [1978] 2 MLJ 156; *Au Kean Hoe v. Persatuan Penduduk D’Villa Equestrian (supra)*; *Dato’ Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur* [2019] 1 CLJ 247; *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805; *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248; and *YAM Tunku Dato’ Seri Nadzaruddin Ibni Tuanku Ja’afar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210.

[28] Based on the aforementioned, Mr Fahri Azzat submitted that in answering the questions of law posed in the NOA, the answers would be that the plaintiffs’ claim has a predominant and substantial public law element; and as such, the plaintiffs should have commenced an action by way of judicial review against DBKL.

The Plaintiffs’ Submissions

[29] The plaintiffs’ initial point of submission touches on how the filing of encl. 74 is purportedly a delay tactic on the part of the defendant. The defendant’s striking out application under O. 18 r. 19(1) of the ROC 2012, having failed following the decision of the Court of Appeal on 23 March 2018, the defendant then filed encl. 74 six months later after pre-trial case management (‘CM’) directions have been given by the court and complied with by the plaintiffs. Dato’ Bastian Verdagón argued that there is inordinate delay by the defendant in alleging that there is a wrong mode of commencement of proceedings, and further, no reasonable explanation has been provided by the defendant for the delay. By its conduct thus far, the plaintiffs aver that the defendant clearly does not want a trial because it has no defence in embarking on the illegal GGS, and even when DBKL approved of the same, the defendant had breached the conditions imposed by DBKL.

[30] The next main point of submission relates to the defendant’s contention that this action should be by way of judicial review which the plaintiffs countered as being absolutely baseless and unfounded. The plaintiffs have pleaded the civil wrongs of nuisance and breach of personal data law in the amended SOC and they are not seeking the traditional remedies under judicial review such as *certiorari*, *mandamus* and prohibition against a public authority. Instead, the reliefs sought against the defendant are for an abatement of the nuisance and the equitable remedy of an inquiry and accounts as regards the personal data allegedly obtained by the defendant contrary to law. Therefore, it was argued that even if the defendant had acted at all times with the authority of DBKL, the defendant is itself still liable in tort and personal data law in this writ action by the plaintiffs.

- A [31] Additionally, it is the plaintiffs' submission that encl. 74 is a disguised second application for striking out. The attempt by the defendant to dispose the matter in a summary manner, this time pursuant to O. 14A and/or O. 33 r. 2 of the ROC 2012, is improper in view of the conflicting allegations of facts. Learned counsel for the plaintiffs submitted that the authority of
- B *Ahmad Jefri Mohd Jahri (supra)* as cited by the defendant is irrelevant, while the cases of *Chan Kum Loong v. Hii Sui Eng* [1979] 1 LNS 10; [1980] 1 MLJ 313 and *Sin-Kung Logistics (KL) Sdn Bhd v. Projek Lebuh raya Usahasama Bhd* [2015] 5 CLJ 457 serve as a reminder against the use of "treacherous shortcuts" and summary dismissal of an entire proceeding by resort to O. 33 r. 2 of the ROC 2012.
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- D [32] Moreover, the procedure envisaged under O. 33 r. 2 of the ROC 2012 is that the court will frame questions for determination before, during or after trial. Therefore, the plaintiffs submitted that what could be done is to have issues of law set down for determination at trial as opposed to proceeding with encl. 74. Ultimately, whether or not the claim is disposed of in this proposed summary manner, the allegation that the plaintiffs have interfered with, or harassed, the defendant, its committee members and the security guards in the discharge of their duties and functions as per the counterclaim involves disputed questions of fact and thus, would still have to go to trial.

E **The Law On O. 14A And O. 33 r. 2 ROC 2012**

[33] For ease of reference, both provisions of the ROC 2012 which are relevant for purposes of the NOA are set out below:

Determination of questions of law or construction (O. 14A r. 1)

- F 1. (1) The court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceeding where it appears to the court that:
- G (a) such question is suitable for determination without the full trial of the action; and
- (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
- (2) On such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.
- H (3) The court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

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Time of trial of questions or issues (O. 33 r. 2)

- I The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[34] It is trite law that O. 14A may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings concludes that the material facts are not in dispute: see the judgment of Hasan Lah FCJ in *Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49; and the decision of the Court of Appeal case in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337, which was later affirmed by the Federal Court in *Kerajaan Negeri Kelantan v. Petroliaam Nasional Berhad & Other Appeals* [2014] 7 CLJ 597.

[35] In so far as the legal principles relating to O. 33 r. 2 of the ROC 2012 is concerned, Varghese George J in *Tenaga Nasional Bhd v. JCY HDD Technology Sdn Bhd* [2013] 7 CLJ 799 at p. 807 held that:

[11] Thirdly, **with regard to O. 33 rr. 2 and 5 RHC, its scope and effusions had been acknowledged by the courts to be wide**, it wide in the genre of procedures open to the court, *like for example O. 14A, which could be utilised to expeditiously, in appropriate situations, make a determination which would likely have the effect of substantially disposing the cause or matter before the court*. The issues could be of pure law or of fact alone or even of mixed questions of fact and law. It could also be made at any stage of the proceedings.

[12] In *Krishnan Rajan N Krishnan v. Bank Negara Malaysia & Ors* [2003] 1 CLJ 388; [2003] 1 MLJ 149, Abdul Malek Ishak J (as he then was) after reviewing various relevant authorities (also citing His Lordship's previous judgement in *Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (interveners) & Another Case* [2001] 5 CLJ 73), although in the main advocating caution in the use of the O. 33 r. 2 procedure, yet approved that *O. 33 r. 2 conferred on the court a wide discretionary power and the overriding consideration to take into account was that the disposal of the application would result in a substantial saving of time and expenditure. Of course, there ought not to be substantial disputes as to facts or that the claim or defense was one riddled with complexities where extrinsic evidence was required*. Similar sentiments were expressed by Ramly Ali J (as he then was) in *Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors* [2006] 7 CLJ 364; [2006] 7 MLJ 39.

(emphasis added)

Evaluation And Findings Of The Court

Was There Delay In The Filing Of Encl. 74?

[36] The defendant contends that there is no delay in the filing of encl. 74 if seen from the date of the change of solicitors acting for the defendant and the subsequent events. In this regard, I have perused the history of the filing of pleadings and documents in this court and the notes of proceedings and it is observed that two firms of solicitors had represented the defendant before the current solicitors (refer to the memorandum of appearance filed on 4 May 2017 (encl. 6) and notice of change of solicitors filed on 19 May 2017 (encl. 7)).

A [37] It is also observed that the striking out application (encl. 9) was filed on 6 June 2017 which is before the defence and counterclaim (encl. 14) was filed on 4 July 2017. The current solicitors representing the defendant took over conduct of the case on 2 May 2018 when a notice of change of solicitors (encl. 45) was filed. Soon thereafter, on 25 May 2018, an application to amend the defence and counterclaim was filed (encl. 46) and allowed by the court on 31 July 20018. The amended defence and counterclaim (encl. 65) was accordingly filed on 7 August 2018, followed by the amended reply and defence to amended counterclaim on 12 September 2018.

C [38] At the CM on 28 March 2018, just five days after the Court of Appeal rendered its decision on the plaintiffs' appeal, the previous counsel for the defendant informed the court that no interlocutory application will be filed. Pre-trial directions were then given by the court. At the next CM on 3 May 2018, the new solicitors appeared for the defendant and informed the court regarding the intention to file encl. 46. The CM after that was held on 28 May 2018 whereupon the plaintiffs' counsel said that:

- D (i) the common bundle of documents had been sent to the previous solicitors acting for the defendant;
- E (ii) the draft agreed facts and issues were sent to the defendant's solicitors on 30 April 2018; and
- (iii) the bundle of pleadings, plaintiffs' list of witnesses and common chronology had been filed on 30 April 2018.

F Meanwhile, it is evident that the defendant has not complied with any of the pre-trial directions. During the CM on 3 September 2018, the defendant's counsel indicated that an application pursuant to O. 33 of the ROC 2012 will be filed soon.

G [39] In light of the record of proceedings as explained above, I am of the considered opinion that the defendant's assertion that the plaintiffs have chosen the wrong mode of commencement of proceedings, if truly genuine and meritorious, should have occurred to the defendant from the very outset ie, soon after the filing of the amended SOC on 10 April 2017 or the notice of change of solicitors (encl. 7), irrespective of whether the two former, or the current, solicitors were/are representing the defendant. The issue that the plaintiffs should have commenced a judicial review proceeding under O. 53 of the ROC 2012 could easily have formed a ground for the defendant's striking out application, where the defendant had relied on limbs (a), (b) or (d) of O. 18 r. 19(1) of the ROC 2012 and/or the inherent powers of the court. In failing to raise this point of argument for purposes of the hearing of encl. 9 and seeking to do so in encl. 74, the defendant is clearly arguing its case by instalments and thereby causing prejudice to the plaintiffs as the progression of the matter for trial has been very much delayed.

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[40] I agree with the submissions by learned counsel for the plaintiffs that for the defendant to now claim an abuse of process of the court, this time with the defendant's stated intention to seek a determination of the issue pursuant to O. 14A and/or O. 33 r. 2 of the ROC 2012, is tantamount to an abuse of the court's process in itself. To my mind, encl. 74 is a disguised second application for striking out, especially considering the fact that the defendant has chosen not to respond to the points as mentioned in para. 3 of the reply submission for the plaintiffs (encl. 87).

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[41] In the upshot, I find that there is merit in the plaintiffs' contention that there is delay on the part of the defendant in making the application in encl. 74.

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Is The Plaintiffs' Claim Against The Defendant Based Solely On Substantive Principles Of Public Law Or Has A Predominant And Substantial Public Law Element?

[42] I shall first deal with the case of *Ahmad Jefri Mohd Jahri* (*supra*) which was heavily relied upon by the defendant in support of its submissions. The appellant in that case was a government officer attached to the Ministry of Culture, Arts and Tourism. Following a dispute with his superior officer, the appellant decided not to turn up for work. Around 22 months later, the appellant's solicitors wrote to the respondents to enquire regarding the appellant's status of employment. It was only then that the appellant came to know that he has been dismissed from government service *vide* a gazette notification. The appellant filed a writ of summons and SOC against the respondents seeking, *inter alia*, a declaration that his dismissal by the respondents is void and that he is still a government officer. The civil suit escalated all the way to the Federal Court where two questions of law were determined by the court revolving on the procedure under O. 53 of the Rules of the High Court 1980 ('RHC') which is similar to O. 53 of the ROC 2012.

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[43] Part of the *ratio decidendi* in *Ahmad Jefri* relates to the use of the correct procedure where it was held that when an explicit procedure is created such as in O. 53 of the RHC, then as a general rule, all application for relief as that sought by the appellant must commence according to what is set down in that provision, otherwise it may be liable to be struck off for abuse of the process of the court. However, the Federal Court also adjudged that there are exceptions to the rule.

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[44] For purposes of my judgment, it is suffice for me to refer to the following passages from the decision of the Federal Court in *Ahmad Jefri* (*supra*, at pp. 896-898) as delivered by James Foong FCJ:

[61] Aside from *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others described under the pre-amended O. 53 RHC, an alternative remedy for an aggrieved party seeking relief against a public authority for infringement of rights to which he was entitled to be protected under

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- A public law is for a declaration. The courts had for a long time recognised their power to grant a declaration under common law. But s. 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is also commonly accepted that O. 15 r. 16 RHC also provides the
- B High Court with such power (see Lord Diplock's judgment in *O'Reilly v. Mackman* (*supra*) at p. 1127). However, O. 53 RHC sets out a specific procedure for an aggrieved party seeking relief, incorporating a declaration (as provided by s. 41 of the Specific Relief Act) against a public authority for infringement of his rights to which he was entitled to be protected under public law, to follow. **It is our view that when such an explicit procedure is created** (as compared to a general provision set out under
- C O. 15 r. 16 RHC) *to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 RHC, otherwise it is liable to be struck off for abusing the process of the court. This general rule enunciated in O' Reilly v. Mackman (supra) has in fact been acknowledged by this court in Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors (supra) and repeated in YAB Dato' Dr Zambry (supra). However, like all general rules, there are exceptions.* This again was recognised
- D by Lord Diplock in *O' Reilly v. Mackman* where he referred to "particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons". Then of course there is the exception for a claim against the public authority for negligence as decided in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*. *There may be others and these "are left to be decided on a case to case basis" as spoken by Lord Diplock in O' Reilly v. Mackman. The circumstances in YAB Dato' Dr Zambry is obviously one such exception* where this court found that a challenge by the appellants on their suspension from attending a State Legislative Assembly is a matter
- E that affects their legal status. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O. 53 RHC.
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- G [62] We observed that *a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 RHC. If it is a mixture of public and private law then the court must ascertain which of the two is most predominant. If it has a substantial public law element then the procedure under O. 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr. Zambry. Much depends on the facts of the case.* But generally the court should be circumspect in allowing a matter which should be by way of O. 53 RHC to proceed in another form. To say that it is open to an applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be rendering O. 53 RHC redundant.
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This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration, then this rule must be adhered to, except in the limited and exceptional circumstances discussed.

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(emphasis added)

[45] Based on the above excerpt from the judgment, it is evident that whether an action is to be commenced by way of filing a writ and SOC, or under O. 53 of the ROC 2012, is dependent on the facts of each case. Further, and in accordance with the guidance provided by the apex court, in deciding the defendant's application herein, I have to first ascertain whether there is a public law element in the dispute. If there is a mixture of public and private law then I have to establish which of the two elements are more predominant.

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[46] Looking at the contents of the pleadings and the affidavits filed in respect of encl. 74, there is no doubt in my mind that this case involves a mixture of public and private law elements. In determining whether the public law or the private law aspect is the principal feature, a closer scrutiny of the pleadings and the said affidavits is required.

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[47] In para. 19 of the amended SOC, some of the acts which the plaintiffs alleged have been committed by the defendant as a result of the defendant's unlawful activities are as follows:

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- (i) obstructed the plaintiffs and members of their respective families from visiting their relations and/or friends residing within the illegal security area;
- (ii) caused, from time to time, the second plaintiff "to borrow" parking space for his motor vehicles in front of and on the properties of his neighbours;
- (iii) caused delay and inconvenience to the plaintiffs and visitor to the said property because pedestrian and vehicular traffic heading from or towards the said property had been diverted by the obstructions;
- (iv) committed various acts of harassment against the plaintiffs and caused annoyance and inconvenience to the plaintiffs in regard to their use and enjoyment of said property, and therefore also a nuisance;
- (v) caused an obstruction of the plaintiffs' right of access from the said property to public streets within the illegal security area and *vice versa*; and
- (vi) threatened to obstruct the first plaintiff in the discharge of his duties as an advocate and solicitor in that he would not be able to deliver business letter to and serve legal document such as writs of summons, order of the courts and witness subpoenas on residents within illegal security

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A area, in particular those who instruct the security guards to obstruct those who intend to deliver such letters to or to serve such documents on them, thereby committing contempt of court in some instances.

[48] In the plaintiffs' AIR (1) (encl. 75), the second plaintiff has averred as follows:

B 10. Since the defendant had no approval at all for its actually illegal scheme for extended periods of time, I am advised by our solicitors and verily believe that it has no defence of statutory authority in answer to our pleaded case in nuisance, breach of personal data law, and all other statutes pleaded. A trial is needed to determine all issues fully and effectually.

C 11. The trouble started when the plaintiffs found out that the front entrance to their property was just outside the illegal security area but the back entrance was within it. As a result, the plaintiffs' access to the back entrance had been blocked by a permanent locked and unmanned barrier. When the defendant "reserved" parking space within the illegal security area, there resulted excessive parking, illegal parking, double parking, etc. of vehicles in the vicinity of the property. Ambulances and fire engines would not be able to pass through because many of the public roads and lanes had been blocked permanently by the defendant. The plaintiffs refuse to be subjected to the use of surveillance cameras by the defendant by which personal data is collected.

E The second plaintiff then continued to state that the pleadings against the defendant include allegations as to breaches of the peace in the vicinity of the plaintiffs' property; harassment, annoyance and inconvenience to the plaintiffs in their use and enjoyment of the said property; harm to the value of the said property; obstruction of the plaintiffs' right of access from the said property to public streets; and pollution of the area in which the said property is situated.

F [49] The plaintiffs have also highlighted that, by virtue of the Delegation of Powers Act 1956 (Revised 1988) [Act 358], the powers of public authorities cannot be delegated to a private body like the defendant, a resident's association. In this regard, para. 2 in DBKL's letter dated 24 October 2016 as can be seen in exh. "NM1" in the defendant's AIS is worded in the following manner:

G 2. Sukacita memaklumkan bahawa pihak DBKL tiada halangan serta membenarkan permohonan tuan secara pentadbiran, untuk tempoh 3 bulan (daripada 01 Oktober 2016 hingga 31 Disember 2016) sebagai tempoh percubaan tertakluk kepada syarat-syarat berikut bersesuaian dengan ketetapan dalam garis panduan yang telah dikeluarkan oleh pihak Kementerian Perumahan dan Kerajaan Tempatan (KPKT) DAN Garis Panduan jabatan ini.

I DBKL's letter dated 8 March 2017 is similarly worded except that approval was granted "untuk tempoh tiga bulan (daripada 8 Mac 2017 hingga 7 Jun 2017) sebagai penyambungan tempoh percubaan".

[50] Three observations can be made about these letters from DBKL, namely that: A

- (i) the approval given by DBKL is an administrative approval and is not pursuant to any power under statute;
- (ii) the said approval is subject to the terms as set out in “Lampiran GN” which are as per the guideline issued by the Ministry of Housing and Local Government, and DBKL; and B
- (iii) the period for which approval is given does not run continuously (a third letter from DBKL dated 19 March 2018 where the guarded neighbourhood was allowed to operate for the period from 12 March 2018 until 11 March 2019 was enclosed to the letter dated 9 January 2019 from the plaintiffs’ counsel to this court and the defendant’s counsel did not raise any objections to the said enclosure). Hence, there were times when the guarded neighbourhood operated without DBKL’s express approval, for example, when the GGS commenced on 2 January 2017 until 7 March 2017 and from 8 June 2017 until 11 March 2018. The defendant’s counsel’s response to this is to say that “Ia adalah kebiasaan proses permohonan kebenaran ini mengambil masa lama dan ketulenan dan keesahan operasi skim G & G itu tidak menyebabkan sebarang masalah. Kelulusan itu adalah formaliti sahaja.” C
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[51] “Lampiran GN” to both DBKL’s letters as mentioned in para. 49 above lists out the conditions in carrying out the guarded neighbourhood at Jalan Limau Manis, Jalan Limau Nipis and Jalan Limau Kasturi, Bangsar, Kuala Lumpur and these include:

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g. Mana-mana orang awam adalah bebas memasuki dan menggunakan jalan-jalan awam atau kemudahan-kemudahan awam dalam kawasan taman perumahan pada setiap masa tanpa sebarang sekatan dari pengawal. Dalam hal ini, pegawai tidak berhak sama sekali meminta dokumen peribadi atau lain-lain dokumen daripada orang awam. G

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k. Pihak Dewan Bandaraya Kuala Lumpur akan merobohkan sebarang struktur pondok dan halangan yang dibina tanpa kelulusan dan boleh menarik balik kebenaran ini tanpa sebarang notis sekiranya syarat-syarat berkaitan termasuk kelulusan struktur tersebut tidak dipatuhi. H

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m. Kebenaran adalah bersifat sementara dan pihak DBKL boleh menarik balik kebenaran ini dan mengarahkan untuk merobohkan pondok kawalan apabila dirasakan perlu atau menerima bantahan kuat dari orang awam atau pelanggaran kepada mana-mana syarat kebenaran ini, tanpa sebarang tuntutan/pampasan boleh di buat oleh pihak tuan/persatuan penduduk. I

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- A p. Walaupun kebenaran secara pentadbiran ini diberi, pihak tuan adalah sentiasa tertakluk kepada mana-mana undang-undang bertulis, peraturan-peraturan dan undang-undang kecil berhubungan dengan permohonan ini.

B [52] The second plaintiff had also averred in para. 5 of the plaintiffs' AIR (2) (encl. 78) that "... DBKL recognised that it was not able to give any sufficient approval to the defendant. It said that the approval was of an administrative nature. It required the defendant to comply with the laws, including statutes such as the National Land Code, the Strata Titles Act 1985 etc. It imposed a condition that the defendant is to bear alone legal liability arising out of the defendant's scheme. It was a condition that the defendant do not personal documents from members of the public and not to obstruct them. The defendant's scheme was started in breach of various laws and conditions and without any approval at all ...".

D [53] In addition, the plaintiffs referred to proviso (d) in sub-s. 44(1) of the Specific Relief Act 1950 [Act 137] which reads as follows:

44. Power to order public servants and others to do certain specific acts.

E (1) A Judge may make an order requiring any specific act to be done or foreborne, by any person holding a public office, whether of a permanent or a temporary nature or by any corporation or any court subordinate to the High Court:

Provided that:

...

F (d) the applicant has no other specific and adequate legal remedy; and

...

G [54] As submitted by the plaintiffs, if there are two or more persons liable, the plaintiffs may choose which of them that they wish to sue and they need not join nor can they be compelled to join, the other persons also liable to them. In other words, the plaintiffs have the right to choose to sue only the defendant in this present suit. Additionally, it could well be argued that the plaintiffs cannot sue DBKL in light of proviso (d) in sub-s. 44(1) of Act 137 whereby the plaintiffs appear to have more than one "specific and adequate legal remedy". Under the heading of "Statements of Claim – Public Nuisance" in *Bullen & Leake & Jacob's Precedents of Pleadings* (13th edn), at H p. 702, the learned authors state that:

I ... A public nuisance is an unlawful act or omission to discharge a legal duty, which endangers the lives, safety, health, property or comfort of the public. ... Apart from such cases, and distinct from relator actions, a public nuisance is a civil wrong and actionable when a private individual has suffered particular damage over and above the general inconvenience and injury suffered by the public

The textbook also show that breaches of statutory provisions and illegality can be pleaded in an action against a private entity for such wrongs as breach of contract, negligence and nuisance.

[55] The meaning of a “public nuisance” was explained by the Court of Appeal in *Attorney-General (on the relation of Glamorgan County Council and Pontardawe Rural District Council) v. PYA Quarries Ltd* [1957] 1 All ER 894, a case which was referred to in the judgment of Gunn Chit Tuan J in *Majlis Perbandaran Pulau Pinang (supra, at p. 158)* in the following words:

From the words of Kindersley V.C. in the above-quoted case of *Soltau v. De Held* it is clear that a nuisance is a public nuisance, if, within its sphere, which is the neighbourhood, it materially affects the reasonable comfort and convenience of a class of the subjects of the State (see *Attorney-General v. P.Y.A. Quarries Ltd.*). A private nuisance, however, is one which disturbs the interest of some private individual in the use and enjoyment of his property by interference with the usual enjoyment of property by causing or permitting the escape of deleterious substances or things such as smoke, odours or noise. The difference between a public and a private nuisance is that, in regard to the former, rights which are common to all subjects are infringed. Such rights are unconnected with the possession of or title to immovable property.

[56] As can be seen from the amended SOC, the plaintiffs here, in contrast to the plaintiff in *Au Kean Hoe's* case (*supra*), are relying on the whole gamut of constitutional and statutory provisions relating to, *inter alia*, the setting up and manning of roadblocks; illegality of obstructions on public roads; law enforcement powers of the police and other agencies and their non-delegable features; and personal data protection in mounting this legal challenge against the defendant. It is undeniable that each statute cited by the plaintiffs has its own attendant enforcement authority but this does not necessarily equate with the plaintiffs’ claim being premised totally or substantially in the realm of public law.

[57] The amended SOC, when taken with the overall affidavit evidence related to encl. 74, lends support for the finding that the plaintiffs’ cause of action has a substantial private law element. Whilst the factual matrix of the case is such that there are features of both public nuisance and private nuisance but the plaintiffs have chosen to frame its cause of action as one that is primarily founded on the private tort of nuisance, which they are well entitled to do. Even applying the “pith and substance” test as advocated by the defendant, I am unable to come to a different conclusion.

Whether This Matter Is One That Can Appropriately Be Dealt With Under O. 14A And/Or O. 33 r. 2 ROC 2012

[58] The aforesaid paragraphs of this judgment clearly show that there are material facts in dispute in this matter. As mentioned earlier, the plaintiffs are using all possible angles in their arsenal of legal arguments to challenge

A the implementation of the GGS. This is certainly not a straightforward case which can suitably be determined under the procedure as provided by O. 14A and/or O. 33 r. 2 of the ROC 2012. This matter has to go for full trial and I directed that the questions of law be drafted in the “issues to be tried”.

B **Conclusion**

[59] Based on the foregoing reasons, I conclude that the answers to the two questions of law posed by the defendant in this application are in the negative. Therefore, the defendant’s application was dismissed with costs of RM5,000 to the plaintiffs subject to allocatur.

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